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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

[redacted]. NO. 609

WILLIAM CLAYTON PIERCE, *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent*

PETITION FOR WRIT OF CERTIORARI
To The United States Court of Appeals
For The Fifth Circuit

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INDEX

	Page
Citations to Opinions Below	1
Jurisdiction	2
Questions Presented	2
Constitutional Provision Involved	2
Statement	2
Reasons for Granting the Writ	5
Conclusion	8
Certificate of Service	9
Exhibit "A"—Opinion of the United States Court of Appeals for the Fifth Circuit	11
Exhibit "B"—Fifth Amendment to the Constitution of the United States	25

LIST OF AUTHORITIES

CASES	Page
Johnson v. United States, 317 Fed. 2d 127 (1963)	6
Kadis v. United States, 373 Fed. 2d 370, 1st Cir., (1967)	6
Sorrells v. United States, 1932, 287 U.S. 435, 53 S.Ct. 210, 77 L.Ed. 413	5
United States v. Dehar, 388 Fed. 2d 430, 2nd Cir., (1968)	6
United States v. Riley, 363 Fed. 2d 955, 2nd Cir., 1966	6
United States v. Sherman, 200 Fed. 2d 880, 2nd Cir., (1952)	7
UNITED STATES CONSTITUTION	
Fifth Amendment	2, 8
UNITED STATES STATUTES	
18 U.S.C. 472 and 473	5
28 U.S.C. 1254(1)	2

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MISC. NO. _____

WILLIAM CLAYTON PIERCE, *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent*

PETITION FOR WRIT OF CERTIORARI
To The United States Court of Appeals
For The Fifth Circuit

WILLIAM CLAYTON PIERCE, Petitioner, prays that a Writ of Certiorari issue to review the Judgment of the United States Court of Appeals for the Fifth Circuit entered in the above entitled case on July 2, 1969.

CITATIONS TO OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit in the above styled case is yet unreported but a copy of that opinion is attached as Exhibit "A".

JURISDICTION

The Judgment of the Court of Appeals for the Fifth Circuit was entered on July 2, 1969. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

QUESTIONS PRESENTED

(1) Does the law of entrapment require the District Court to submit that issue to the jury where it is proved that the Government Agent induced the commission of a criminal offense.

(2) Does the law of entrapment require the District Court to submit that issue to the jury where it is proved that the Government Agent induced the commission of a criminal offense and where there was evidence relating to the lack of predisposition on the part of the Petitioner to commit the offense.

CONSTITUTIONAL PROVISION INVOLVED

The Constitutional provision involved is the Fifth Amendment to the Constitution of the United States. That provision is attached as Exhibit "B".

STATEMENT

On May 20, 1966, Bobby Woodham, a Government undercover agent, contacted Mr. Emmett Lee, who was suspected of dealing in counterfeit money. Mr. Lee was advised that the Secret Service had information that he had passed or been present when counterfeit notes were passed. On several occasions Mr. Lee was asked to cooperate by the Secret Service, and in return they would see that the United States would hear about it. (S.F. 202)

In consideration for the Government's promise, Mr. Lee was asked to contact the Petitioner by telephone in Corpus Christi, Texas, and to arrange a meeting between the Government undercover agent and the Petitioner. That conversation took place on the 18th or 19th of May, 1966. On arrival in Houston, Mr. Lee in the presence of Government undercover agent, Mr. Woodham, again contacted the Petitioner. According to the record, no mention of counterfeit money had been made up to that time. Mr. Lee and Mr. Woodham then went to Petitioner's place of business where he rebuilds wrecked cars. Some conversation was had about Petitioner's business, but no mention was made about counterfeit money. (S.F. 361) A second personal contact was made the same day and again the conversation was about his garage business, in general, and, in particular, about an air conditioning hose on a car that had exploded earlier that day. Finally, the Government Agent stated, "I am interested in making a fast buck." (S.F. 361) He elaborated that he wanted some counterfeit money and that he wanted a sample. Petitioner stated that he didn't have any and asked Emmett Lee, "Don't you have any of the stuff." (S.F. 362) The Agent testified that Petitioner said he would get a sample for him. The trio then adjourned and went to the Blue Diamond Cafe where they drank beer from 1:00 P.M. until 4:15 P.M. During that time, the Agent testified that the Petitioner made no mention of counterfeit money. (S.F. 366) Two days later and after another contact during that time by Lee and Woodham, they again went to Petitioner's garage. On this occasion, Petitioner indicated that two bills had arrived from his source in Oklahoma City by mail. The Agent offered money for the bills and Petitioner refused. (S.F. 367) From this

date, May 23, 1966, to August 12, 1966, a period of approximately two and one-half months, the Government Agent telephoned Petitioner thirteen times long distance and five to ten times locally for a total of eighteen to twenty-three calls, all in an attempt to induce Petitioner to contact a source in Oklahoma City and get them to deliver counterfeit money to him. (S.F. 211) In addition, there were at least six personal contacts by the Government Agent and four telephone calls by Emmett Lee. To all of these entreaties by the Government Agent and Emmett Lee, Petitioner responded only once in August of 1966 by means of a telegram sent to the Government Agent's post office box in San Antonio, Texas. (S.F. 208) Finally, the Government Agent came personally to Petitioner's garage in Houston and offered $3,500.00 for $10,000.00 in counterfeit money. (S.F. 147) The amount of counterfeit he had requested before was only $1,000.00. (S.F. 145) The Agent stated that Petitioner then called his source in Oklahoma City to see if he would deliver the money. (S.F. 147) It was apparent that Petitioner was not in possession of any counterfeit money. The money was not delivered as promised. (S.F. 149) Again, Petitioner stated that it would be delivered on the 11th of August. On the morning of the 12th, the Agent called and said, "All right, is he here with it?", to which Petitioner replied, "He is here with the money and we are ready to deal." (S.F. 153) The Agent appeared in Houston at the airport. Petitioner delivered the counterfeit money and the Agent delivered $3,500.00 of good money. He was arrested and the co-defendant, Red Holt, from Oklahoma City, was later arrested at Petitioner's garage in Houston. Petitioner had been acquainted with the co-defendant, Red Holt, for over twenty years, and

had been in the car and truck business with him. (S.F. 280) Petitioner was indicted and convicted of two counts of passing counterfeit money in violation of 18 U.S.C. 472 and 473, for which he was sentenced to serve a period of ten years.

REASONS FOR GRANTING THE WRIT

1. The decision of the United States Court of Appeals for the Fifth Circuit in approving the District Court's action of refusing to submit the law of entrapment to the jury after the Petitioner had proved beyond all reasonable doubt that there was an inducement and after having offered evidence showing a lack of predisposition to commit the criminal offense on his part, is in conflict with the decisions of other Courts of Appeal on the same matter.

2. The quantum and nature of proof required for a court to submit the law of entrapment to a jury constitutes an important question of Federal law which, has not been, but should be settled by this Court.

The United States Supreme Court recognized thirty-six years ago that a person charged with committing a Federal crime could successfully defend himself, notwithstanding his commission of acts that would otherwise constitute criminal conduct, if he could show entrapment. *Sorrells v. United States,* 1932, 287 U.S. 435, 53 S.Ct. 210, 77 L.Ed. 413. The Court, in the *Sorrells* case viewed entrapment as being implicitly exempted by Congress in the statutory definition of any crime. A defendant who has been entrapped has not committed the crime proscribed by Congress. Hence, the question of entrapment goes to his guilt or innocence of the offense charged

and it is to be resolved by the jury. Since that decision, several of the Circuit Courts of Appeal have taken different positions upon the question of entrapment. The position of the Court of Appeals for the District of Columbia is expressed by *Johnson v. United States,* 317 Fed. 2d 127 (1963) where it held that, "the furnishing by the officer of Government money, itself a persuasive factor, to an intermediary acting for the officer in carrying out the transaction, with a reward to the accused of a part of its fruit was enough to raise a factual issue of official inducement for the jury to decide one way or another."

The Court of Appeals for the Second Circuit at the present time maintains two positions on that subject. *United States v. Riley,* 363 Fed. 2d 955, 2nd Cir., 1966, holds, "A sensible middle of the road solution consistent with its own decisions and with most everywhere would be that, even when inducement has been shown, submission to the jury is not required if uncontradicted proof is established that the accused was ready and willing without persuasion and to have been awaiting any propitious opportunity to commit the offense." The second position of the Second Circuit is expressed in *United States v. Dehar,* 388 Fed. 2d 430, 2nd Cir., (1968), where the Court held that once the Government's inducement or initiation of the crime was put in issue, the Judge was required to charge the law of entrapment unless the accused's propensity was established by uncontradicted proof.

The position of the First Circuit Court of Appeals is expressed in *Kadis v. United States,* 373 Fed. 2d 370, 1st Cir. (1967), when it held, "Henceforth, we will look singly at the ultimate question of entrapment. If

the defendant shows, through Government witnesses or otherwise, some indication that a Government Agent corrupted him, the burden of disproving entrapment will be on the Government; but such a showing is not made simply by evidence of a solicitation. There must be some evidence tending to show unreadiness.

The classic definition of the law of entrapment was set forth by Judge Learned Hand in *United States v. Sherman*, 200 Fed. 2d 880, 2nd Circuit, (1952), when he held that entrapment presented two questions of fact: "(1) Did the Agent induce the accused to commit the offense charged in the indictment; (2) If so, was the accused ready and willing without persuasion and was he awaiting any propitious opportunity to commit the offense."

The Fifth Circuit Court of Appeals has held in its opinion giving rise to this petition for writ of certiorari that, "There is nothing to go to the jury if the evidence as a whole, including all inferences that can reasonably be called from it, both with respect to the Government's actions and the Defendant's occupation, experience and background, is uncontradicted that the Government did not employ methods of persuasion or inducement that would create a substantial risk that the offense would be created by a person who was not ready to commit it, that is, that it neither misled an innocent person into transgression nor overcame the scruples of a person who would otherwise have resisted temptation. Under these circumstances there is no issue of entrapment for the jury to decide, as an instruction on the question, indeed, the mere use of the term entrapment might be misleadingly suggestive."

The positions of the above Circuits provide at least four variations on the theme of entrapment and the burden and nature of the evidence requiring that issue to be submitted to the jury. It is submitted that this Court should put to rest the differences and distinctions between the Circuits so that a defendant in Houston, Texas, receives the same trial with the same legal yard stick that is used in New York City, Washington, D. C. or anywhere else in the United States of America.

CONCLUSION

It is respectfully submitted that this Honorable Court should grant Petitioner's Petition for Writ of Certiorari and reverse and remand said cause to the United States Court of Appeals for the Fifth Circuit for action consistent with the Opinion and Orders of this Honorable Court so that there will be no curtailment of Petitioner's constitutionally guaranteed rights under the Fifth Amendment to the Constitution of the United States.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, William E. Ladin, attorney for Petitioner herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 11th day of September, A.D. 1969, I served a copy of the foregoing Petition for Writ of Certiorari upon the Honorable Solicitor General of the United States, Department of Justice, Washington 25, D.C., and upon the Honorable James R. Gough, Assistant United States Attorney, 515 Rusk Avenue, Houston, Texas, by depositing envelopes containing such copies in the United States Mail, with first class postage affixed thereto, air mail where applicable, return receipt requested and addressed as aforesaid.

William E. Ladin

WILLIAM E. LADIN

EXHIBIT "A"

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 25236

WILLIAM CLAYTON PIERCE, *Appellant,*

versus

UNITED STATES OF AMERICA, *Appellee.*

Appeal from the United States District Court for the Southern District of Texas

(July 2, 1969)

Before COLEMAN and GODBOLD, Circuit Judges, and RUBIN, District Judge.

RUBIN, District Judge: The defendant, Pierce, was convicted on two counts of passing and selling counterfeit money,[1] and sentenced to a term of ten years. Appealing, he complains that the trial judge improperly refused to charge the jury on entrapment, that the government failed to disclose the address of a witness about whom he inquired in pre-trial proceedings, [2] that the gov-

1. In violation of 18 U.S.C. §472.

ernment failed to produce earlier than it did the transcription of a government agent's report concerning statements by defendant, and that he did not receive a fair trial as a result of the conduct of the Assistant United States Attorney who handled the prosecution.

I. ENTRAPMENT — THE FACTS

The principal witness for the government was a Secret Service agent. The agent induced a third person, who was suspected of passing counterfeit bills, to introduce him to Pierce by promising the third person favorable consideration by the United States Attorney's Office. After the agent met Pierce, he began a lengthy series of conversations in an attempt to arrange for the purchase of a quantity of counterfeit money.

The undercover agent initiated the conversations and persisted in them over a period of several months. During this time, he telephoned Pierce a total of thirteen times long distance, made two collect calls that Pierce refused, and spoke to Pierce eight to ten times by local telephone. He also saw Pierce several times at a garage where Pierce engaged in rebuilding wrecked cars. But the agent's uncontradicted testimony was that, from the time of the first overture, Pierce was trying to work out a sale of the counterfeit product. Pierce purported to be a broker acting on behalf of undisclosed principals who were themselves the manufacturers. He represented that his principals were skittish. The agent initially tried to buy a small amount of counterfeit money but, although Pierce indicated [3] willingness to do business, each offer eventually proved fruitless because on each occasion he reported some difficulty with the manufacturers. After a time, the

agent increased the amount of his offer, and Pierce then became "very receptive."

As a result of further conversations, Pierce arranged to deliver $10,000 in counterfeit $20 bills to the agent at an airport in exchange for $3,500 in genuine currency. An arrest was made in the airport following the exchange.

The government also arrested one Joseph D. ("Red") Holt and charged him with conspiring with Pierce to pass counterfeit money. Holt was acquitted on the conspiracy charge and the court then dismissed that count as to Pierce. The defendant's theory is that the government "attempted to get Red Holt through Mr. Pierce and in the process entrapped Mr. Pierce into committing a crime." Pierce did not take the stand, and only the government's witness testified with respect to these negotiations.

II. ENTRAPMENT — PRINCIPLES APPLICABLE

Certain types of criminal activity are consensual and covert. Hence they are virtually undetectable without the use of a government agent or an informer. Narcotics peddlers, brokers of counterfeit currency, transporters of prostitutes across state lines, and gamblers employing interstate facilities to transmit bets all do business clandestinely. Their victims are willing, sometimes eager, accomplices. Their crimes are likely [4] to go unchecked unless the government can itself approach a suspect to offer him the opportunity to commit a crime and thus give evidence of his guilt. Hence, "[i]t is well settled that the fact that officers or employees of the government merely afford opportunities or facilities for the commission of the offense does not defeat the prosecu-

tion. Artifice and stratagem may be employed to catch those engaged in criminal enterprises." *Sorrells v. United States,* 1932, 287 U.S. 435, 441, 53 S.Ct. 210, 77 L.Ed. 413.

But no one should be convicted of a crime if he was either an innocent seduced by a government agent or one whose resistance was overcome. For the government must not lead astray by persuasion or proffered delight even those who had some criminal instincts but "who would normally avoid crime and through self-struggle resist ordinary temptations."[2]

The United States Supreme Court therefore recognized thirty-six years ago that a person charged with committing a federal crime could successfully defend himself, notwithstanding his commission of acts that would otherwise constitute criminal conduct, if he could show entrapment.[3] *Sorrells v. United States,* 1932, [5] 287 U.S. 435, 53 S.Ct. 210, 77 L.Ed. 413; *Sherman v. United States,* 1958, 356 U.S. 369, 78 S.Ct. 819, 2 L.Ed. 2d 848; *Masciale v. United States,* 1958, 356 U.S. 386, 78 S.Ct. 827, 2 L.Ed. 2d 859. See also *Osborn v. United States,* 1966, 385 U.S. 323, 87 S.Ct. 429, 17 L.Ed. 2d 394. A majority of the

2. Sherman v. United States, 1958, 356 U.S. 369, 384, 78 S.Ct. 819, 2 L.Ed.2d 848, 857 (Frankfurter, J., concurring). The Model Penal Code of the American Law Institute defines entrapment in this context as "employing methods of persuasion or inducement which create a substantial risk that such an offense will be committed by persons other than those who are ready to commit it." Section 2.13.

3. The first federal case to recognize the doctrine was Woo Wai v. United States, 9 Cir. 1915, 223 F. 412. *See generally* Donnelly, Judicial Control of Informants, Spies, Stool Pigeons, and Agent Provocateurs, 60 Yale L.J. 1091, 1098-1115 (1951); Note, 45 Tex. L. Rev. 578 (1967); Note, 26 La. L. Rev. 848 (1966); Note, 74 Yale L.J. 942 (1965).

Court in the *Sorrells* case viewed entrapment as being implicitly excepted by Congress from the statutory definition of any crime. A defendant who has been entrapped has not committed the crime. A defendant who has been entrapped has not committed the crime proscribed by Congress. Hence, the question of entrapment goes to his guilt or innocence of the offense charged and is to be resolved by the jury.[4]

But even in a criminal prosecution the mere fact that an issue, if controverted, is for the jury does not require the judge to submit it when a defendant is merely attempting to cloud the minds of the jurors with irrelevancies. There must first be evidence sufficient at least to raise the issue and justify its consideration.[5] Of course, once there is such evidence, it [6] is the function of the jury to weigh it, and the judge cannot refuse to submit the issue merely because he thinks that the defense has little merit.

In this respect, entrapment is no different from any other issue in a criminal prosecution. Difficulties do arise, however, when, as here, courts attempt to determine when the evidence relative to entrapment is sufficient to require the submission of the issue to the jury.

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4. A minority of the Court has always believed that the defense was a judicial one, recognized by the courts for the protection of their "own functions and the preservation of the purity of its own temple. . . ." 287 U.S. at 457, 53 S.Ct. at 218, 77 L.Ed. at 425. Hence, in the view of the minority of the Court, the issue is one to be tried by the court. *See generally* United States v. Riley, 2 Cir. 1966, 363 F.2d 955, 957.

5. In Blake v. United States, 5 Cir., en banc, 1969, ____F.2d ____, we said: ". . . the question of sufficiency of the evidence necessary to make an issue for the jury . . . is for the court." *See also* United States v. Riley, *supra*.

Judge Learned Hand set forth the classic formulation of the problem in *United States v. Sherman,* 2 Cir. 1952, 200 F.2d 880, as presenting two questions of fact: "(1) did the agent induce the accused to commit the offense charged in the indictment; (2) if so, was the accused ready and willing without persuasion and was he awaiting any propitious opportunity to commit the offense." 200 F.2d at 882.[6]

This Circuit has also considered entrapment as involving two issues, each to be considered separately. Following Judge Hand's opinion in *Sherman, supra,* we have held that the burden of proving inducement on the defendant,[7] and the burden of proving that the inducement [7] did not corrupt an innocent or unwilling man is on the government. *Hannah v. United States,* 5 Cir. 1968, 396 F.2d 785; *Kivette v. United States,* 5 Cir. 1956, 230 F.2d 749.[8]

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6. In dealing with entrapment, courts and commentators have shown a weakness for metaphor as well as for definition. *See,* e.g., ALI Model Penal Code, Tentative Draft No. 9, p. 21, which indicates that the relevant inquiry is: "Is the defendant a strayed lamb or an ensnared wolf?" *See* Donnelly, *supra* note 3, at 1114.

7. "Inducement" as such would appear to be present, however, in any case in which the undercover agent initiated the negotiations for the criminal deal. *See* Sherman v. United States, 1958, 356 U.S. 369, 382, 78 S.Ct. 819, 2 L.Ed.2d 848 (Frankfurter, J., concurring); Trent v. United States, D.C. Cir., 1960, 284 F.2d 286, 288 n.2; *accord,* Berry v. United States, D.C. Cir., 1963, 324 F.2d 407, 410 (dissenting opinion).

8. The First Circuit held recently that it would require submission of the entrapment issue to the jury whenever there is evidence that would warrant a finding that the government initiated the opportunity for the defendant to commit the crime, with instructions that "the defendant is entitled to a charge that the government has the burden of proving beyond a reasonable doubt either that there was in fact no inducement, or that the defendant was predisposed." Sagansky v. United States, 1966, 358 F.2d 195, 202-203. It reviewed

[8] There is dicta in some of our opinions that can be urged to suggest that the entrapment defense should go to the jury whenever there is some evidence of an initial approach by the government. See *Wall v. United States,* 5 Cir. 1933, 65 F.2d 993; *Accardi v. United States,*

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its position in Kadis v. United States, 1 Cir. 1967, 373 F.2d 370 and said:

> "Henceforth we will look, singly, at the ultimate question of entrapment. If the defendant shows, through government witnesses or otherwise, some indication that a government agent corrupted him, the burden of disproving entrapment will be on the government; but such a showing is not made simply by evidence of a solicitation. There must be some evidence tending to show unreadiness."
> 313 F.2d at 374

A somewhat different position has been taken in the Second Circuit. The views of two different panels of that Circuit are reflected in United States v. Riley, 2 Cir. 1966, 363 F.2d 955, and United States v. Dehar, 2 Cir. 1968, 388 F.2d 430. The opinion by Judge Friendly in *Riley* rejects the *Sagansky* view, and says:

> "A sensible middle of the road solution, consistent with our own decisions and with most elsewhere, would be that, even when inducement has been shown, submission to the jury is not required if uncontradicted proof has established that the accused was 'ready and willing without persuasion' and to have been 'awaiting any propitious opportunity to commit the offense.' ". 363 F.2d 959.

The Court of Appeals for the District of Columbia would apparently go as far as *Sagansky,* for in Johnson v. United States, 1963, 317 F.2d 127, it held that "the furnishing by the officer of Government money, itself a persuasive factor, to an intermediary acting for the officer in carrying out the transaction, with a 'reward' to the accused of a part of its fruit" was enough "to raise a factual issue of official inducement for the jury to decide one way or the other." 317 F.2d at 128. Judge Bastian, dissenting, said:

> "I have also thought a basic requirement of that defense to be that the Government use some form of direct persuasion on the accused to urge him to commit the crime, else I do not see why it is unfair or unjust to convict him of the crime he admittedly has committed. In all of the cases I have encountered in which entrapment has been urged successfully, there was evidence that the Government sought directly to *persuade* the accused to violate the law." 317 F.2d at 133. (Emphasis in original.)

5 Cir. 1958, 257 F.2d 168; *Park v. United States,* 5 Cir. 1960, 283 F.2d 253; *Walker v. United States,* 5 Cir. 1962, 301 F.2d 94; *Brainin v. United States,* 5 Cir. 1963, 314 F.2d 460, rehearing denied, 317 F.2d 69. And in a factual situation comparable to the one here presented, the issue of entrapment has been submitted to a jury. *Suarez v. United States,* 5 Cir. 1962, 309 F.2d 709, 711.

When it first faced the issue squarely, however, this Circuit recently held that the entrapment issue need not be presented to the jury if the evidence does not sufficiently raise the issue. *Snowden v. United States,* 5 Cir. 1967, 384 F.2d 357. And this is the inevitable conclusion to be reached from the Supreme Court's statement in *Lopez v. United States,* 1963, 373 U.S. 427, 436, 83 S.Ct. 1381, 10 L.Ed.2d 462:

> "Indeed, the paucity of the showing [of entrapment] [9] might well have justified a refusal to instruct the jury at all on entrapment."

We affirm the view implicitly adopted in *Snowden.* There is neither need nor reason for the trial judge to deal with the issue of entrapment differently from the way he handles any other issue. If there is any evidence in the record that, if believed by the jury, would show that the government's conduct created a substantial risk that the offense would be committed by a person other than one ready to commit it,[9] then, as in all other cases involving questions of guilt or innocence, the jury must be permitted to resolve the matter. If the record as a whole is devoid of such evidence, astute defense counsel may

9. This is the test for entrapment suggested by the ALI Model Penal Code (Proposed Official Draft) §2.13(1)(b), p. 43 (1962).

not invite confusion of the jury by seeking charges on this or on any other problem not presented by the case before the court.[10] [10] The court should charge the jury only on issues properly before it; it is not appropriate to convert the charge into a treatise on criminal law.

Hence, there is nothing to go to the jury if the evidence as a whole, including all inferences that can reasonably be drawn from it, both with respect to the government's actions and the defendant's occupation, experience and background, is uncontradicted that the government did

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10. In Encinas-Sierras v. United States, 9 Cir. 1968, 401 F.2d 228, 232, the court stated: "Since there was no evidence of entrapment, the district court was right in refusing to give an instruction on that subject. It would have served only to confuse the jury." For cases following the same view, see, e.g., United States v. Ramsey, 2 Cir. 1967, 374 F.2d 192; United States v. Lile, 6 Cir. 1961, 290 F.2d 225; United States v. Di Donna, 2 Cir. 1960, 276 F.2d 956; United States v. Gironda, 2 Cir. 1959, 267 F.2d 312; United States v. Place, 2 Cir. 1959, 263 F.2d 627; Crisp v. United States, 4 Cir. 1958, 262 F.2d 68.

The evidence was held sufficient to go to the jury in a host of cases which the following are typical: Cazares-Ramirez v. United States, 5 Cir. 1969, _____F.2d_____; Carson v. United States, 9 Cir. 1962, 310 F.2d 558; Coronado v. United States, 5 Cir. 1959, 266 F.2d 719; United States v. Sawyer, 3 Cir. 1954, 210 F.2d 169; Lutfy v. United States, 9 Cir. 1952, 198 F.2d 760.

If there is a factual controversy it is usually for the jury to resolve, not for the court to find as a matter of law. United States v. Gaines, 6 Cir. 1965, 353 F.2d 276; United States v. Williams, 6 Cir. 1963, 319 F.2d 479; Hattem v. United States, 9 Cir. 1960, 283 F.2d 339. However, the evidence may be so strong that the court may be justified in finding entrapment as a matter of law. Suarez v. United States, 5 Cir. 1962, 309 F.2d 709, 711; Henderson v. United States, 5 Cir. 1958, 261 F.2d 909; United States v. Klosterman, 3 Cir. 1957, 248 F.2d 191.

Compare the discussion of entrapment as a defense in the ALI Model Penal Code, Tentative Draft No. 9, pp. 13-24. The Institute has taken the position that the trial of the entrapment issue is for the court. ALI Model Penal Code (Proposed Official Draft) §2.13(2) (1962). Whether the jury or the court should resolve the entrapment issue is discussed at pp. 21-22 of Tentative Draft No. 9.

not employ methods of persuasion or inducement that would create a substantial risk that the offense would be committed by a person who was not ready to commit it, that is, that it neither misled an innocent person into transgression nor overcame the scruples of a person who would otherwise have resisted temptation. Under these circumstances there is no issue of entrapment for the jury to decide, and an instruction on the question—indeed, the mere use of the term "entrapment"—might be misleadingly suggestive.

Searching the record in this light, we find no evidence of entrapment here. Pierce was eager to sell [11] counterfeit money to the undercover agent from the moment they first met. Like any good salesman, he extolled the quality of his wares. Like any cautious criminal, he sought to avoid detection. He was cool to the agent in only one conversation, when he told the agent that his sources of supply suspected the agent of being "an FBI man." Even in this conversation, he evidenced merely fear of detection, not lack of eagerness to make the profit he would receive as a middleman in an illegal enterprise if he could negotiate a sale of the counterfeit wares. As the Court observed in *Osborn v. United States, supra,* (where the issue had been submitted to the jury) to furnish " 'opportunity or facilities' for the commission of a criminal offense . . . is a far cry from entrapment." 385 U.S. at 331-332. In our opinion, therefore, the trial judge properly refused to submit the entrapment issue to the jury.

III. OTHER ISSUES

Appellant contends that he is entitled to a new trial because of the conduct of the Assistant United States

Attorney in failing to disclose the address of a witness. The defendant filed a motion asking the court to require the government to disclose the whereabouts of "Tony Garcia" and another person. The judge ordered the Assistant United States Attorney handling the prosecution to furnish any information the government had. The Assistant United States Attorney furnished the address of the other person, but said he had no information about "Tony Garcia."

[12] The defense also filed a Jencks Act motion. After the government rested, it tendered the material required by the Jencks Act. 18 U.S.C. §3500. This material contained references to "Rudolph Anthony Garza." This man was in fact the person about whom the defense had previously inquired, and he was not present at the trial. Over defense objection, the trial judge ordered the trial to proceed, but, after the conviction, he held an evidentiary hearing on a motion for a new trial and concluded that the defendant had not been prejudiced in any way by the absence of Garza.

We have carefully reviewed the record, and we find that it amply supports the trial judge's conclusion that no prejudice resulted because of the absence of Garza. This in no way condones the action of the Assistant United States Attorney. Once an order has been directed to counsel, the court's ruling must be complied with in spirit as well as in letter, and information may not be withheld with the notion that this can be done with impunity if the evidence is ultimately found not to be helpful to the defense. However, in this case, the testimony of Garza was in fact taken and it was shown that it could have been of no conceivable benefit to the defendant. In

addition, the trial court took such action as it considered necessary to discipline the overzealous Assistant United States Attorney, and the United States Attorney's office also took action to prevent the likelihood of such episodes recurring. Therefore, we have concluded that the interests of justice do not require a reversal on this issue.

[13] The defendant also complains that he was not furnished transcriptions of oral statements made by the defendant prior to trial. The trial court ordered these produced during the trial, and we think he acted within the range of discretion allowed him under Rule 16(a).

Nor is there merit in the complaint that the government said, in response to a motion to produce under Rule 16(a) of the Federal Rules of Criminal Procedure, that it had no "written or recorded statements made by the defendant," when in fact it had a report by the undercover agent that quoted oral statements made by Pierce. The agent's report was delivered to the judge together with other material during the trial, and the judge ordered it delivered to defense counsel.[11] Under the circumstances of this case, we think that the trial judge acted within the proper limits of his discretion.[12]

The final issue raised by the appeal is the alleged coercion by the government of Pierce's former wife, who was a witness in the case. The trial judge received evidence on the matter and found no improper action by the government. We are of the same view.

Therefore, the judgment is AFFIRMED.

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11. See generally 19 U.S.C. §3500.

12. *Cf.* Battaglia v. United States, 9 Cir. 1965, 349 F.2d 556, 560; United States v. Knox Coal Company, 3 Cir. 1965, 347 F.2d 33, 48; Ogden v. United States, 9 Cir. 1962, 3003 F.2d 724, 740.

[14] GODBOLD, Circuit Judge, specially concurring:

I concur in the opinion written by my Brother Rubin. But I must state briefly what I understand the court to be deciding.

As the majority point out, based on *Sherman v. United States,* 200 F.2d 880 (2d Cir. 1952), entrapment is concerned with two areas of evidence, the evidence of what the government did (the "inducement") and the evidence of whether the defendant is one not likely or not ready to commit the crime (the "predisposition"). *Sherman,* repeatedly followed in this circuit and elsewhere, also establishes that the burden of proof of governmental activity is on the defendant and the burden of proof of predisposition is on the government. I understand that we do not depart from that principle.

If all the evidence establishes *without contradiction* that the government did not employ methods of persuasion or inducement that would create a substantial risk that the offense would be committed by a person who was not ready to commit it, then there is nothing to go to the jury. If there is evidence which, if believed by the jury, would show that the government engaged in conduct which created a substantial risk that the offense would be committed by a person other than one ready to commit it, and if the jury could conclude, from all the evidence, that the defendant was not ready to commit the act (i.e., was not predisposed), then the matter must go to the jury; in this circumstance the court cannot take from the jury the question of whether the governmental conduct in fact did lead an innocent [15] into transgression or did overcome the scruples of a person who otherwise would have resisted temptation.

For reasons stated in my dissent in *Snowden v. United States,* 384 F.2d 357, 358 (5th Cir. 1967) I do not draw my conclusions from what my associates in this case, drawing from a cryptic fragment of a sentence in *Snowden,* say is implicit in that decision.

EXHIBIT "B"

FIFTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES OF AMERICA

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of war or public danger; nor shall any person be subject to the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property without due process of law; nor shall private property be taken for public use, without just compensation.

In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 609

WILLIAM CLAYTON PIERCE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

The judgment of the court of appeals was entered on July 2, 1969. A petition for rehearing was denied August 20, 1969. The petition for a writ of certiorari was filed on September 18, 1969.

Petitioner was convicted by a jury in the United States District Court for the Southern District of Texas for passing and selling counterfeit money, in violation of 18 U.S.C. 472, 473, and was sentenced to imprisonment for ten years (R. 1-5, 68). The court of appeals affirmed (Pet. Ex. A).

Petitioner claims as error the refusal of the trial court to give an entrapment instruction. The evidence showed that on May 21, 1966, a Secret Service agent secured through an informant, Lee, an introduction, under an assumed name, to petitioner at the latter's automobile wrecking shop in Houston, Texas. After an exchange of greetings, petitioner and the agent freely discussed the agent's interest in obtaining some counterfeit money. The agent asked to see a sample. Petitioner said he had none, but to call around eleven o'clock the next morning (Tr. 53-61).

The agent and Lee went to petitioner's shop the next day at about 1:00 p.m. Petitioner said that he had contacted his source, in Oklahoma City, and that he should receive a sample by special delivery the following day around 11:00 a.m. The three men then drove to a restaurant, where they ate and drank until about four o'clock (Tr. 62-63).

The following day, May 23, after making a call to petitioner, the agent drove to his shop. Petitioner said, "It came right after you all called." He then presented a folded sheet of yellow lined paper, inside of which were two twenty-dollar counterfeit Federal Reserve notes. After comparing the samples with a genuine bill, the agent complimented petitioner and asked if all the notes were like that. Petitioner assured him that they were and gave him the samples without charge (Tr. 64-69). After discussing price, the agent offered to buy a thousand dollars worth of the notes. Petitioner did not give him a final answer, but said that he could be reached either at his shop or at two other telephone numbers which he gave the agent (Tr. 70-74; G.E. 1-3).

A succession of delays in consummating a purchase ensued, during which the agent made numerous telephone calls to petitioner. After petitioner, on May 25 and 28, had made promises of delivery, he said, on May 29, that the deal had fallen through; that things were "getting hot" where the notes were made, but the agent should call the next week (Tr. 140-142). Eventually a deal was agreed upon for the purchase of $10,000 in counterfeit notes, at a price of $3,500 (Tr. 142-148). Following additional delays, occasioned in part by suspicions on the part of petitioner's connection regarding the agent, arrangements were made final for the promised delivery (Tr. 149-153).

On August 12, the agent drove to the Houston airport and called petitioner, saying that he had just arrived by plane and would like to deal at the airport. Petitioner delivered $10,000 in counterfeit twenty-dollar notes and the agent paid petitioner $3,500. Secret service agents then closed in and made the arrest, seizing both the counterfeit and the official funds used for the purchase (Tr. 155-161).

At the conclusion of all the evidence, petitioner requested that the court give an instruction on entrapment.[1] Nothing in the evidence, however, con-

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[1] If petitioner submitted a proposed instruction, it does not appear in the record. The reasons his counsel gave for requesting such an instruction were (Tr. 372-373):

> The charge I am interested in is entrapment. The large number of telephone calls that were made by this witness to Mr. Pierce, the fact he only responded one time, the long time this alleged conspiracy continued, the fact he didn't have the money when Mr. Lee introduced

tradicts the government agent's testimony, or otherwise discloses the slightest reluctance on petitioner's part to sell counterfeit currency. The delays that occurred were brought about by petitioner's connection, who feared detection. Petitioner himself approached the subject of an unlawful sale without hesitation and took immediate steps to supply a sample of the finished product. As the court of appeals pointed out, "the agent's uncontradicted testimony was that, from the time of the first overture, Pierce was trying to work out a sale of the counterfeit product" (Pet. Ex. A 12).

The fact that government agents afford opportunities or facilities for the commission of an offense does not constitute entrapment. *Sorrells* v. *United States*, 287 U.S. 435, 441; *Sherman* v. *United States*, 356 U.S. 369, 372; *Lopez* v. *United States*, 373 U.S. 427, 436; *Lewis* v. *United States*, 385 U.S. 206, 208. Petitioner's argument essentially rests on the proposition that the jury might have disbelieved the government agent's version of events. But if no proof suggests a basis for such disbelief, no instruction on entrapment is appropriate. *United States* v. *Giuliano*, 383 F. 2d 30, 35 (C.A. 3), certiorari denied, 389 U.S. 1055; *United States* v. *McMillan*, 368 F. 2d 810, 812 (C.A. 2), certiorari denied, 386 U.S. 909;

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the agent to him. I think it is an obvious inference from the evidence that Mr. Lee may have been using Mr. Pierce as a so-called patsy in this case and that Mr. Pierce is merely a front man for this and that he was not really in possession of the money until Mr. Lee gave him some.

United States v. *Bishop*, 367 F. 2d 806, 810 (C.A. 2); *United States* v. *Riley*, 363 F. 2d 955, 959 (C.A. 2); *United States* v. *Berry*, 362 F. 2d 756, 758 (C.A. 2); *Berry* v. *United States*, 324 F. 2d 407, 408-409 (C.A. D.C.), certiorari denied, 376 U.S. 959; *Brainin* v. *United States*, 314 F. 2d 460 (C.A. 5); *Hester* v. *United States*, 303 F. 2d 47, 48-49 (C.A. 10), certiorari denied, 371 U.S. 847. Whatever differences in approach there may be among the circuits with regard to the giving of an entrapment instruction, they are not raised in the factual circumstances of this case.

It is therefore respectfully submitted that the petition for a writ of certiorari be denied.

ERWIN N. GRISWOLD,
Solicitor General.

OCTOBER 1969.

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